STATE OF MICHIGAN
IN THE SUPREME COURT

JEANNETTE GORDON,

Plaintiff-Appellant,

v.

HENRY FORD HEALTH SYSTEM,
Self-Insured,

Defendant-Appellee.

No: _____

COA No: 244596

WCAC
LC No: 01-000173

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DEFENDANT-APPELLEE'S ANSWER TO
PLAINTIFF-APPELLANT'S APPLICATION FOR LEAVE TO APPEAL

PROOF OF SERVICE

COUNTER-STATEMENT OF JUDGMENT ON APPEAL AND RELIEF BEING SOUGHT

Defendant-Appellee Henry Ford Health System asks that this Court deny Plaintiff-Appellant Jeannette Gordon's Application for Leave to Appeal from the November 18, 2003 Opinion and Order of the Michigan Court of Appeals, affirming the January 25, 2002 decision of the Workers' Compensation Appellate Commission.

COUNTER-STATEMENT OF QUESTION PRESENTED

WHETHER THIS COURT SHOULD DENY PLAINTIFF-APPELLANT'S APPLICATION FOR LEAVE TO APPEAL, BECAUSE THE COURT OF APPEALS CORRECTLY RULED THAT THE WCAC, APPROPRIATELY APPLIED ITS STANDARD OF REVIEW, AND DID NOT ERR BY TREATING ALL OF PLAINTIFF-APPELLANT'S NET INCOME FROM OPERATIONS AS A MEASURE OF EARNING CAPACITY.

Plaintiff-Appellant states: "No."

Defendant-Appellee states: "Yes."

This Court should state: "Yes."

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STATEMENT OF FACTS

Introduction

This case has a history of appellate decisions. Most recently, on November 18, 2003, the Michigan Court of Appeals issued its Opinion and Order (Appendix A) (On Remand from this Court as on leave granted (Appendix B)), after the April 25, 2002 Michigan Court of Appeal's denial of Plaintiff-Appellants' Application for Leave to Appeal (Appendix C), the January 25, 2002 Worker's Compensation Appellate Commission (WCAC) Opinion and Order (Appendix D).

In its January 25, 2002 Opinion and Order, the WCAC had reversed[1] an April 7, 2001 decision by Workers' Compensation Magistrate Patrick MacLean (Appendix E), which denied a petition by Defendant-Appellee, Henry Ford Health System, to recoup monies paid to Plaintiff-Appellant, Jeanette Gordon, as part of an open award of $397 per week entered June 23, 1992 (Appendix D). Essentially, the WCAC accepted Magistrate MacLean's findings of fact, but disagreed with his legal conclusion that Plaintiff-Appellant's income from operating two adult foster care homes did not constitute wages or evince a wage-earning capacity for purposes of § 371(1) of the Workers Disability Compensation Act (WDCA), MCL 418.101 *et seq.*, such that her earnings from the adult foster care homes could be setoff against the "compensation payable" so that the two, when added together, would "not exceed [Plaintiff's] average weekly earnings at the time of the injury." MCL 418.371(1). Consequently, the WCAC held that Defendant-Appellee *could* setoff Plaintiff-Appellant's business income against her wage-loss benefits to the extent that, together, they exceeded her weekly earnings at the time of injury, and *could* recoup money it has overpaid Plaintiff-Appellant, going back one year from the September 3, 1998 filing of Defendant-Appellee's

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[1] The WCAC reversed in part and affirmed in part. However, the net effect was to reverse the result.

petition (Appendix D, pp. 18-19, 28).

In the November 18, 2003 Opinion and Order of the Court of Appeals, examined "whether the profits Plaintiff-Appellant received as the owner/operator of two group homes can be set off from her wage loss benefits for a previous work-related injury with defendant" (Appendix A, p. 1). The Court of Appeals noted that deference was to be given to the administrative agency's construction of statutory provisions and that its' review of the WCAC's construction of MCL § 418.371(1) was limited to a "clearly incorrect" standard (Appendix A, p. 4). Reviewing MCL § 418.371(1), and the WCAC's interpretation, the Court of Appeals held that Plaintiff-Appellant had not met her burden to show the WCAC was clearly incorrect in its review, affirming that Defendant-Appellee was entitled to the credit set off, and affirming the en banc decision of the WCAC (Appendix A, pp. 4-5).

Plaintiff-Appellant continues to argue the en banc decision of the WCAC was erroneous because, in Plaintiff-Appellant's view: (1) the WCAC misapplied its standard of review; and (2) even if the WCAC correctly determined that some of Plaintiff-Appellant's business income constituted wages or a wage-earning capacity for purposes of MCL § 418. 371(1), the WCAC should have determined that part of the business income at issue constituted a return on investment, arguing this would not be subject to setoff.

Throughout this matter, Defendant-Appellee has opposed Plaintiff-Appellant's Application's for Leave, relying on its position that Plaintiff-Appellant's claims of error are without merit, a position affirmed by the Court of Appeals, in both the April 25, 2002 and November 18, 2003 Opinion and Orders of the Court of Appeals (Appendix A) (Appendix C).

Background.

Plaintiff-Appellant began employment with Defendant-Appellee as a nurse in June of 1977.

According to Plaintiff-Appellant, on May 22, 1987, she felt a pull in her back while lifting a patient onto a bed from a gurney. As a result, Plaintiff-Appellant was off from work until September 1987. Thereafter, Plaintiff-Appellant successfully returned to work as a nurse until February 16, 1988, when, according to Plaintiff-Appellant, she slipped on ice in one of Defendant-Appellee's parking lots and, although she caught herself before falling, experienced a shooting pain in her lower back. Since that time, Plaintiff-Appellant has not returned to work. On June 23, 1992, Workers' Compensation Magistrate Mary Susan Connolly determined that Plaintiff-Appellant had established by a preponderance of evidence that she experienced, and continued to suffer from, a disabling lower back injury, along with an emotional overlay resulting from the pain in her back causing psychological disability. Magistrate Connolly awarded Plaintiff-Appellant weekly wage-loss benefits of $364.86 per week for the period of May 23, 1987 through September 12, 1987, and issued an open award of weekly wage-loss benefits of $397.00 per week running from February 17, 1988 (Opinion/Order, dated June 23, 1992, attached hereto as Appendix F).

On August 24, 1998, after learning that Plaintiff-Appellant was earning a substantial income as an adult foster care home administrator, Defendant-Appellee filed a "Petition to Recoup" on an "Application for Mediation or Hearing--Form C" (attached hereto as Appendix G). The specific basis for the recoupment set out in the attachment to the petition stated:

> Plaintiff is currently the owner/operator of a group home known as Mt. Vernon Adult Foster Care Home, located at 16300 Mt. Vernon, Southfield, Michigan 48075, and has been since April 10, 1997. Plaintiff has not notified Henry Ford Health System or the Bureau of Workers' Disability Compensation of this employment and income despite the fact that Defendant is paying Plaintiff $397 per week pursuant to an Order. Defendant seeks recoupment of all monies earned by Plaintiff and seeks the enforcement of the fraud provision of the Act (Appendix G, p. 2).

In a November 27, 2000 trial brief, Defendant-Appellee explained that the legal basis for its

petition was § 371(1) of the WDCA, which provides that "[t]he compensation payable, when added to the employee's wage earning capacity after the personal injury in the same or other employments, shall not exceed the employee's average weekly earnings at the time of the injury." MCL 418.371(1). Defendant-Appellee explained in its trial brief that, under the circumstances, Plaintiff-Appellant's income from operating these adult foster care homes should be treated like ordinary wages for purposes of the setoff that arises when actual earnings are used to impute wage-earning capacity under § 371(1) (Defendant-Appellee's Trial Brief, Certified Record). In response, Plaintiff-Appellant submitted a trial brief which argued that Plaintiff-Appellant's income from operating adult foster care homes did not evince a wage-earning capacity because her income was the profit on work done by others and that "[t]here has been no showing by petitioner that Plaintiff was paid real wages for any services rendered" (Plaintiff-Appellant's Trial Brief, pp. 2-3 [undated], Certified Record).

A hearing on Defendant-Appellee's petition for recoupment was conducted on September 6 and 19, 2000, before Workers' Compensation Magistrate Patrick MacLean. Plaintiff-Appellant testified that she is the owner/operator of two adult foster care homes for mentally disabled residents (Tr I, pp. 17-18, 69, 71),[2] which operate under the corporate name "Mt. Vernon Group Home, Inc." Plaintiff-Appellant and her daughter are the sole shareholders of the corporation, but Plaintiff-Appellant is the licensee for the adult foster care homes (Tr I, p. 19).[3]

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[2] For ease of reference, "Tr I" indicates the hearing transcript for September 6, 2000, and "Tr II" indicates the hearing transcript for September 19, 2000.

[3] Adult foster care homes are typical houses in residential areas, but the residents are cared for by direct-care workers who staff the home. The state (i.e., the Department of Community Mental Health) funnels budgeted funds to such homes through intermediate agencies, such as Oakland Community Mental Health (See, e.g., Tr I, p. 23).

With regard to Plaintiff-Appellant's actual involvement with the running of the homes, Plaintiff-Appellant testified that she deals with the State (Tr I, pp. 20, 22-23) and that she visits the homes just about every day to make sure that the residents are being taken care of and the staff is attending to their needs. If there are any objections or gripes, Plaintiff-Appellant makes herself available to discuss them (Tr I, p. 27). Plaintiff-Appellant allowed that sometimes she is the one who does the grocery shopping for the homes, and that she sees to it that the homes are provisioned with whatever papers, pencils, charts and other necessary supplies (Tr I, pp. 28-29). In addition, Plaintiff-Appellant conceded that she signs payroll checks, transports residents, establishes wages, hires and fires staff members, and retains people to perform maintenance inside and outside the homes (Tr I, p. 33). Defendant-Appellee also introduced testimony of a private investigator, as well as video tapes of Plaintiff-Appellant picking up and delivering supplies to the group homes (Tr I, pp. 115-127; Tr II, p. 5).

When confronted with an application for credit that she herself had filled out, Plaintiff-Appellant admitted that she had represented that her employer was Mt. Vernon Group Home, that her occupation was RN/Administrator/Landlord, and that her monthly salary was $10,000 (Tr I, pp. 64-65; Defendant-Appellee's Exhibit #3 to 9/6/00 hearing, attached as Appendix H). Plaintiff-Appellant's tax returns for the relevant period revealed her reported income from the operation of the foster care homes, as well as her reported rental income/losses from her ownership of several properties. The Magistrate summarized this evidence as follows:

> [P]laintiff's 1998 individual U.S. tax return shows . . . plaintiff earning $87,474.00 from Mt. Vernon Group Home, Inc., and $8,396 from rental income without any income from wages and salaries. The same income tax return indicates that the corporation had total income of $242,511.00 less business-related deductions of $155,037.00. Additionally, defendant introduced plaintiff's 1999 U.S. income tax return that shows corporate earnings of $60,321.00 with plaintiff also reporting a loss of $17,743 from her rental real estate activities resulting in supplemental income of

$42,578.00 for 1999. According to plaintiff, her income from her group home business represents return on her initial investment (Appendix E, pp. 3-4).

The Magistrate's Decision.

On April 7, 2001, Magistrate MacLean issued an Opinion and Order denying Defendant-Appellee's petition for recoupment. The Opinion itself, after summarizing the evidence adduced at the hearing, began with a legal conclusion regarding the applicability of MCL 418.371(1), stating:

> As this section refers to post-injury wage-earning capacity, and as defendant does not claim that plaintiff's post-injury income established a post-injury wage-earning capacity or that the income affected the existence of plaintiff's disability, it is clear that MCL 418.371(1) cannot apply to defendant's request for recoupment (Appendix E, pp. 5-6, citing *Krimmel v Sears, Roebuck & Co*, 180 Mich App 672, 674; 447 NW2d 852 (1989)).

The Magistrate further opined that "it is clear that plaintiff's income from the group homes represents investment or ownership income and not wages." The Magistrate supported this conclusion by looking at the definition of "wages" and by noting that the Michigan Supreme Court has defined wages as:

> . . . real, palpable and substantial consideration as would be expected to induce a reasonable person to give up the valuable right of a possible claim against the employer in a tort action . . . . *Hoste v Shanty Creek Management, Inc*, 459 Mich 561, 576 (1999) (Appendix E, p. 6).

The Magistrate did not, however, explain why the $87,474.00 of net operating income that Plaintiff-Appellant received in 1998 would not be considered "real, palpable and substantial," or why it might be analogous to "[t]he privileges of free skiing, complimentary hot beverages, and meal discounts" that the Supreme Court did not view as "real, palpable and substantial" in *Hoste, supra* at 577.

Factually, the Magistrate concluded that Plaintiff-Appellant was credible regarding the extent of the services she performed, noting that "while Plaintiff hired management teams for each of the group homes, Plaintiff did maintain an owner's control over hiring and firing employees, handling

complaints from residents, and ensuring proper treatment of residents, as well as performing more incidental services, such as occasionally driving residents and delivering supplies" (Appendix E, p. 6). The Magistrate then concluded that: (1) Plaintiff-Appellant's income from operating the group homes was a return on her investment and not remuneration for her services; (2) Plaintiff-Appellant's income from her rental properties was investment income and not wages; (3) because Plaintiff-Appellant's income was not wages, and did not establish a post-injury wage-earning capacity, Defendant-Appellee was not entitled to a setoff under MCL § 418. 371(1). Consequently, the Magistrate denied Defendant-Appellee's petition to recoup (Appendix E, p. 7).

The WCAC's Review.

On April 26, 2001, Defendant-Appellee filed a claim for review of the Magistrate's decision with the WCAC. In an appeal brief filed on July 19, 2001, Defendant-Appellee argued that the Magistrate had erred by concluding that § 371(1) of the WDCA was inapplicable, and had also erred by concluding that Plaintiff-Appellant's income from the group homes constituted investment income rather than earnings attributable to her efforts as the administrator of the group homes (Defendant-Appellee's Appeal Brief to WCAC, Certified Record). Defendant-Appellee challenged the Magistrate's conclusion that Plaintiff-Appellant's post-injury wage-earning capacity had not been put at issue, inasmuch as "the very nature of the Application for Hearing brings the issue of wage earning capacity to the forefront" (Defendant-Appellees Appeal Brief to WCAC, p. 8). In arguing that Plaintiff-Appellant should not be allowed to manipulate the Workers' Compensation system simply because she controlled the manner of her remuneration, Defendant-Appellee pointed to decisions of other jurisdictions that had addressed the same issue. Essentially, the rule from those cases is that income from sole proprietorships or subchapter S corporations is considered for purposes of measuring a claimant's wage-earning capacity if the profits are the result of the

Workers' Compensation claimant's personal management and endeavor (Defendant-Appellee's Appeal Brief, pp. 9-10). Defendant-Appellee noted that, here, "[i]t is obvious that, without Plaintiff directly overseeing the every day functioning of the homes and her direct involvement in every facet of the operation, the business would not exist" (Defendant-Appellee's Appeal Brief, p. 13).

The Majority Opinion. The WCAC, in a majority opinion authored by Commissioner Leslie, and joined by Chairperson Skoppek along with Commissioners Martell, Witte and Wyszynski, reversed the Magistrate's decision regarding Defendant-Appellee's entitlement to use Plaintiff-Appellant's business earnings as a measure of her wage-earning capacity for purposes of setoff under § 371(1), but affirmed the Magistrate's denial of credit to Defendant-Appellee for income earned by Plaintiff-Appellant on rental property, as well as the denial of Defendant-Appellee's initial request to invoke the fraud provisions of the WDCA. The central holding of the WCAC Opinion is contained in the following sentence: "We believe the correct rule is that an employer may receive credit for the net earnings of an individual who is able to operate an independent business after injury without regard to whether those earnings are denominated wages or profits" (Appendix D, p. 18). However, the depth of the WCAC's analysis warrants further treatment herein.

After thoroughly reviewing the Magistrate's opinion (Appendix D, pp. 1-6), the WCAC began its analysis with a historical review of § 371[4] and its interrelation with §§ 361, 301(4) and 301(5) of the WDCA. Section 371 was part of the original Act passed in 1912, and was borrowed from Wisconsin law. Initially, it provided that a claimant's weekly wage loss, as referred to in the Act, was a percentage of his wages at the time of injury, with the percentage representing "the

[4] For clarity, the WCAC referred to the relevant provisions by their current section numbers.

proportionate extent of the impairment of earning capacity in the employment in which he was working at the time of the accident." Meanwhile, § 361 determined entitlement to weekly benefits on the basis of the difference of average weekly wages at the time of injury and average weekly wages that the claimant was able to earn thereafter. In the first case to address the possible friction between these sections, *Foley v Detroit United Ry*, 190 Mich 507; 157 NW 45 (1916), this Court declined to find the provisions to be in conflict, but instead harmonized them such that the definition given by § 371 became the wage loss referred to in § 361(1). Moreover, § 371 controlled regarding the fact that wage loss was measured exclusively with regard to impairment of wage-earning capacity in the type of employment the claimant was engaged in at the time of injury. Hence, this led to the anomalous result that injured workers could return to a new line of work, and receive full compensation benefits for as long as their wage-earning capacity in their previous line of work remained impaired (Appendix D, pp. 7-8).

The WCAC majority noted that, "in response to this state of affairs," in 1927 the Michigan Legislature added the proviso to § 371 that is at issue in this case, which now reads:

> Provided, the compensation payable, when added to the employee's wage earning capacity after the injury in the same or another employment, shall not exceed the employee's average weekly earnings at the time of the injury. [MCL 418.371(1).]

In the first case construing this language, *MacDonald v Great Lakes Steel Corp*, 268 Mich 591, 594; 256 NW 558 (1934), this Court held that this provision had no effect on the basic computation of compensation, but instead permitted a setoff against compensation payable by reason of earning capacity in another occupation (Appendix D, pp. 8-9). Subsequent cases interpreting the provision primarily dealt with the question of wage-earning capacity where the claimant was not working, but other cases (though not all) held that an employer could use a claimant's actual wages as a measure of wage-earning capacity for the setoff allowable under § 371(1). Ultimately, this Court definitively

decided, in *Powell v Casco Nelmor*, 406 Mich 332, 347-348; 279 NW2d 777 (1979), that, even where actual wages do not establish a new general wage-earning capacity (such as when the claimant is given favored work), so long as actual wages are being earned the employer may take credit for those earnings for purposes of the setoff proviso in § 371(1). Moreover, the WCAC noted, the Magistrate had, in this case, interpreted *Krimmel, supra* in a way that directly and impermissibly contradicted *Powell* when, in fact, *Krimmel* need not have been interpreted that way (i.e., the one-time commission that was not credited to the employer in *Krimmel* was from the sale of a business that the Plaintiff-Appellant owned and operated before his injury) (Appendix D, pp. 8-12).

The WCAC then examined the effect that the 1982 additions of §§ 301(4) and 301(5) had on the ability of an employer to take a deduction from compensation payable pursuant to § 371(1). Subsection 301(4) defines disability to mean a limitation on wage-earning capacity, but clarifies that establishing a disability does not give rise to a presumption of wage loss. Meanwhile, § 301(5) provides a series of determinations to be made *if* the claimant returns to reasonable employment. The WCAC noted that utilizing these "reasonable employment provisions" is mandatory, but that not every post-injury earnings situation is covered by § 301(5). In this case, because Plaintiff-Appellant began her own business rather than returning to employment, the WCAC concluded that none of the "ifs" of § 301(5) were satisfied, so "the proviso of section 371(1) in combination section 361(1) determines [Defendant-Appellee's] entitlement to credit" (Appendix D, pp. 12-17).

The WCAC then turned its scrutiny to the nature of Plaintiff-Appellant's after-injury earnings. It accepted the Magistrate's findings concerning ordinary facts (i.e., Plaintiff-Appellant's involvement in running the group homes), but rejected the Magistrate's determination regarding the legal effect of those facts. In other words, it rejected the Magistrate's application of the law to the facts (Appendix D, p. 17). The WCAC said that "[t]o refuse to permit credit in such a situation

would enrich the employee at the employer's expense simply because the employee chose to operate her own business rather than return to service with another employer." The WCAC noted that, not crediting an employer with Plaintiff-Appellant's earnings in this situation would place Plaintiff-Appellant in the position of employees prior to the 1927 proviso, where injured employees could receive both full compensation and full earnings, and it is well-settled that workers' compensation law does not favor double recovery (Appendix D, p. 18).

The Concurrence. Commissioner Przybylo wrote separately in order to emphasize that, although he agreed with the result reached by the majority, he did not interpret the reasonable employment provisions as narrowly as did the majority opinion (Appendix D, p. 20). Extrapolating from this, one must conclude that, in Commissioner Przybylo's view, Plaintiff-Appellant had returned to reasonable employment, and thus her entitlement to weekly wage-loss benefits would have been governed by MCL 418.301(5)(b) and (c), which clearly would allow Defendant-Appellee to take credit for Plaintiff-Appellant's actual wages. Moreover, it therefore follows that Commissioner Przybylo would treat Plaintiff-Appellant's income from operations as wages from employment.

The Partial Concurrence/Partial Dissent. Commissioner Kent expressly agreed that the "magistrate erred in denying Defendant-Appellee's claim for credit or offset of plaintiff's subsequent earnings" (Appendix D, p. 20), but did so on the basis of his view that the reasonable employment provisions of § 301(5) should clearly be applied. He relied on "the current Supreme Court's tendency for literal construction when interpreting statutory language," to conclude that if a claimant establishes a disability under § 301(4), then **ALL** entitlement to weekly wage loss benefits is determined according the provisions of § 301(5). Although Defendant-Appellee cannot agree with Commissioner Kent's conclusion that § 371(1) does not provide an applicable limitation

on Plaintiff-Appellant's entitlement to receive weekly wage loss benefits under the circumstances of this case (see Argument, *infra*), the key point for present purposes is that even Commissioner Kent agrees that Plaintiff-Appellant's income from the adult foster care homes is creditable to her, for purposes of calculating her entitlement to weekly wage loss benefits, just as if it were wages from employment.

ARGUMENT

I. THIS COURT SHOULD DENY PLAINTIFF-APPELLANT'S APPLICATION FOR LEAVE TO APPEAL, BECAUSE THE COURT OF APPEALS OPINION CORRECTLY RULED THAT THE WCAC DID NOT MISAPPREHEND ITS STANDARD OF REVIEW, AND IT DID NOT ERR BY TREATING ALL OF PLAINTIFF-APPELLANT'S 'S NET INCOME FROM OPERATIONS AS A MEASURE OF EARNING CAPACITY.

Standard of Review. A party, such as Plaintiff-Appellant, seeking leave to appeal to the Michigan Supreme Court is obligated to demonstrate in her application one of the grounds for granting leave listed in MCR 7.302(B). Essentially, the applicant must demonstrate that the decision being appealed was clearly erroneous and will cause material injustice, or that the it is one of significant public interest. In worker's compensation cases, "[t]he judicial tendency should be to deny leave to appeal from decisions of the WCAC or, if leave is granted, to affirm, in recognition of the WCAC's expertise in this extremely technical area of the law." *Mudel v Great A & P Tea Co*, 462 Mich 691, 732; 614 NW2d 607 (2000), citing *Holden v Ford Motor Co*, 439 Mich 257, 269; 484 NW2d 227 (1992).

If this Court were to grant leave to appeal, the standard of review it must apply are the standards set forth in *Mudel, supra*:

> The judiciary treats WCAC's findings of fact, made within the WCAC's powers, as conclusive absent fraud. If there is any evidence supporting the WCAC's factual findings, the judiciary must treat those findings as conclusive. MCL

418.861a(14).

The judiciary reviews the WCAC's decision, not the magistrate's decision. MCL 418.861a(14).

The judicial tendency should be to deny leave to appeal from decisions of the WCAC or, if leave is granted, to affirm, in recognition of the WCAC's expertise in this extremely technical area of law. *Holden v Ford Motor Co,* 439 Mich 257, 269; 484 NW2d 227 (1992).

The judiciary exercises a very narrow scope of review over the WCAC's decisions, designed to ensure that the WCAC did not misapprehend its administrative appellate role in reviewing decisions of the magistrate. *Id.*

The judiciary continues to review questions of law involved in any final order of the WCAC under a de novo standard of review. *DiBenedetto v West Shore Hosp.,* 461 Mich 394, 401; 605 NW2d 300 (2000) [*Mudel, supra* at 732].

Discussion. This is clearly one of those cases where this Court's initial reaction to Plaintiff-Appellant's application should be to follow the judicial tendency of denying leave to appeal in recognition of the expertise of the WCAC in this extremely technical area of the law. Indeed, all seven Commissioners participated in the decision, and all seven of them agreed that Defendant-Appellee was entitled to a setoff against compensation payable on the basis of her income from her administration of two adult foster care homes. Five members of the Commission agreed on why. As the Court of Appeals held, the WCAC unquestionably got this right. As for the specific issues raised in Plaintiff-Appellant's application, first, it is beyond question that the application of the law to undisputed facts is a legal ruling, so the WCAC did not err by not deferring to the Magistrate in that regard. Second, the undisputed facts demonstrate that Plaintiff-Appellant's argument regarding apportioning income between her efforts and a return on her investment has already been adequately addressed. Consequently, Plaintiff-Appellant cannot establish that the WCAC's judgment and/or the Court of Appeals affirming of this judgment was clearly erroneous or will cause material injustice. Leave to appeal should be denied.

A. The WCAC Properly Concluded That The Magistrate Had Erred Regarding the Applicability of § 371(1).

Plaintiff-Appellant does not directly challenge the legal analysis employed by the WCAC, but it behooves Defendant-Appellee to point out that the WCAC reached the correct result. While the quality of the analysis in the WCAC's majority opinion speaks for itself, there are a few points, and maybe some focus, that Defendant-Appellee can add that may be of aid to this Court.

First, it is important to remember that the WDCA represents certain legislative policy choices. That is, the WDCA abrogates tort liability founded upon an employer's negligence in failing to maintain a safe working environment, but in exchange employers must provide certain compensation to employees for injuries suffered in the course of employment, regardless of fault. *Clark v United Technologies Automotive, Inc*, 459 Mich 681, 686; 594 NW2d 447 (1999); *Mathis v Interstate Motor Freight System*, 408 Mich 164, 179; 289 NW2d 708 (1980); *Herbolsheimer v SMS Holding Co, Inc*, 239 Mich App 236, 240; 608 NW2d 487 (2000). However, as part of this bargain, the type and amount of compensation that an employee may collect from an employer is limited. *Id.* For instance, aside from payment for medical care or rehabilitation costs, there are only two types of benefits available under the WDCA–wage loss benefits and specific loss benefits. Specific loss benefits are payable for the loss of such things as an arm or an eye pursuant to a statutory schedule and regardless of wage loss. All other benefits are not compensation for an injury itself, but only compensation for wage loss. See, e.g., *Holbrook v General Motors Corp*, 204 Mich App 637, 642-645; 516 NW2d 135 (1994). Consequently, the first question to be answered in a case like the one at hand is whether Plaintiff-Appellant has a compensable wage loss. Given the fact that the WDCA places limits (based on earnings or earning capacity) on compensation payable, the more specific question in this case is how Plaintiff-Appellant's income from operating two adult foster

care homes is to be treated.

Second, this Court has clearly laid out the basic principles for proving wage loss, stating:

> To prove wage loss, an employee demonstrates that, as a consequence of work-related injury or disease, he has suffered a reduction in his earning capacity. The amount of benefits is based on the employee's actual wage loss.
>
> In application, these basic principles operate to require that an employee must establish (1) a work-related injury, (2) subsequent loss in actual wages, and (3) a causal link between the two. Proof of the three elements will establish that an employee can no longer perform at least a single job within his qualifications and training, thus satisfying the first sentence of 301(4),and that he has suffered a loss in wages, satisfying the second sentence of subsection 301(4). [*Haske v Transport Leasing Inc*, 455 Mich 628, 634-635; 566 NW2d 896 (1997).]

Third, the subsection of the WDCA at issue in this case expressly provides that the compensation payable under the Act cannot exceed a certain amount, stating:

> The weekly loss in wages referred to in this act shall consist of the percentage of the average weekly earnings of the injured employee computed according to this section as fairly represents the proportionate extent of the impairment of the employee's earning capacity in the employments covered by this act in which the employee was working at the time of the personal injury. The weekly loss in wages shall be fixed as of the time of the personal injury, and determined considering the nature and extent of the personal injury. The compensation payable, when added to the employee's wage earning capacity after the personal injury in the same or other employments, shall not exceed the employee's average weekly earnings at the time of the injury. [MCL 418.371(1) (emphasis added).]

Fourth, this Court has expressly stated that the above-underlined "proviso has no effect on the determination of the basic computation of compensation. It merely allows a sort of set-off against it." *MacDonald v Great Lakes Steel Corp*, 268 Mich 591, 594; 256 NW 558 (1934). Furthermore, this Court has definitively decided that actual earnings, even earnings that do not, by their nature, evince a continuing ability to earn them, are creditable against compensation payable under § 371(1). Specifically, the Court said:

> [T]he performance of post-injury work at no wage loss precludes payment of disability benefits while that work continues. This result is statutorily directed by

> [the at-issue proviso of § 371(1)]. This provision was added to the workers' compensation act in 1927 to specifically preclude benefits in the event that an injured employee was working at another job subsequent to the worker's injury which paid comparable or higher wages. Under this provision, the employer is permitted to deduct (or set off) from compensation payable the employee's wages or wage-earning capacity after the injury. However, a post-injury wage-earning capacity is established only if a claimant has accepted regular employment with ordinary conditions of permanency. [*Powell v Casco Nelmor Corp*, 406 Mich 332, 347-348; 279 NW2d 769 (1979) (emphasis added; citations omitted).]

In the instant case, the WCAC never reached the issue of whether Plaintiff-Appellant's administration of the group homes had established a new wage earning capacity. All that the WCAC held was that, under *Powell*, while Plaintiff-Appellant continued to perform post-injury work at no wage loss or at a reduced wage loss, Defendant-Appellee is permitted to deduct or setoff Plaintiff-Appellant's earnings from compensation payable.

Fifth, the application of § 371(1) to income from self-employment, pursuant to the rule articulated by the WCAC, comports with recent precedent from the Court of Appeals. Specifically, the WCAC stated: "We believe the correct rule is that an employer may receive credit for the net earnings of an individual who is able to operate an independent business after injury without regard to whether those earnings are denominated wages or profits" (Appendix D, p. 18). Recently, the Court of Appeals published an opinion affirming an order of the WCAC that reduced to zero an award by the magistrate of weekly wage loss benefits. Part of what the WCAC based its decision on was that the magistrate should have taken into account the claimant's earnings from a sole proprietorship dedicated to selling insurance when determining, pursuant to *Haske, supra*, whether the claimant had proven that he sustained a work-related disability that resulted in actual wage loss. *George v Burlington Coat Factory,* 250 Mich App 83; 645 NW2d 722 (2002). Obviously, the use of proceeds from a sole proprietorship insurance business to establish wage-earning capacity validates the rule articulated by the WCAC in this case. While the *George* case was decided under

Haske, that distinction is not relevant here. What is relevant is that the plaintiff's earnings from operating an insurance agency (i.e., self-employment) were cumulated with his average weekly wages from other employment to determine whether his wage-earning capacity exceeded that which he was earning when he was injured.

In the instant case, Plaintiff-Appellant is not unlike many of the other state-licensed professsionals who earn their living through their own endeavors, but do so in a business form that would be considered self-employment. Professions such as lawyers, doctors, plumbers, and barbers, to name just a few, commonly earn income working for themselves doing the same jobs that would entitle them to wages if they did them while in the employ of another. Plaintiff holds state-issued licenses to operate two adult foster care homes. These licenses are governed by the Adult Foster Care Facility Licensing Act, MCL 400.701, *et seq.,* which imposes a number of administrative duties on the license holder or "responsible person." Further, pursuant to MCL 400.710, the administrative rules found at R 400.1401, *et seq.,* impose a considerable number of additional duties on the licensee or "responsible person." Plaintiff is not entitled to "make profit" in the sense of ordinary businesses. Rather, the state, through intermediary agencies, pays Plaintiff budgeted amounts for the needs of residents and pays Plaintiff for the administration of the homes.[5]

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[5] See, e.g., *People v Coates* and *People v El Shadai, Inc,* unpublished opinion per curiam of the Court of Appeals, decided November 30, 1999 (Docket Nos. 206223 and 206224) (attached as Appendix I), where the Court of Appeals summarized one of these funding arrangements as follows:

> An adult foster care facility like El Shadai home is funded under a contract that budgets expenses by their type. In this case, the funds flowed from the Michigan Department of Mental Health (the Department) to the Detroit/Wayne Community Mental Health Board, which contracted with Residential Care Alternatives, which in turn contracted with El Shadai. Direct care wages and fringe benefits are Schedule A items, Schedule C consists of utilities, insurance, transportation, consumables and certain other costs, while Schedule D covers costs to purchase equipment. Except for the Schedule E budget, which is designated for

Plaintiff's net income from such administration is her remuneration for engaging in her profession as an administrator of adult foster homes (see also Issue C, *infra.*).

Finally, some comment is warranted regarding the partial concurrence/partial dissent of Commissioner Kent, in which he expresses the notion that § 301(5) of the WDCA precludes applicability of § 371(1) to this situation. Recall that Commissioner Kent takes the position that if a claimant establishes a disability under § 301(4), then **ALL** entitlement to weekly wage loss benefits is determined according the provisions of § 301(5) (Appendix B, p. 25). Given the otherwise excellent analysis in Commissioner Kent's opinion, it is surprising to note that his entire conclusion in this regard is the result of a rather simple error in reading the plain language of § 301(5). Specifically, he ignores the word "and" and then fails to appreciate the difference between the word "subsection" and the word "section" in the following sentence from § 301(5):

> (5) If disability is established pursuant to subsection (4), entitlement to weekly wage loss benefits shall be determined pursuant to this section and as follows. [Emphasis added.]

Although Commissioner Kent purports to be guided by this Court's current penchant for "plain language" interpretation of statutes,[6] a plain language analysis of the above provision would

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> the home's administration, unexpended funds must be returned to the state at the end of the fiscal year [Appendix I, slip op at 2].

See also Plaintiff-Appellant's testimony (Tr I, p. 23).

[6] "Where statutory language is clear and unambiguous, its plain meaning reflects legislative intent, and judicial construction is not permitted." *Michalski v Bar-Levav*, 463 Mich 723, 731; 625 NW2d 754 (2001). See also, e.g., *Nawrocki v Macomb Co Rd Com'n*, 463 Mich 143, 159; 615 NW2d 702 (2000) ("[i]t is a fundamental principle of statutory construction that the words used by the Legislature shall be given their common and ordinary meaning, and only where the statutory language is ambiguous may we look outside the statute to ascertain the Legislature's intent"); *Helder v Sruba*, 462 Mich 92, 99; 611 NW2d 309 (2000) ("[w]hen statutory language is clear and unambiguous, the court must honor the legislative intent as clearly indicated in that language and no further construction is required or permitted").

preclude Commissioner Kent's interpretation. That is, his partial concurrence/partial dissent interprets the above sentence to mean that if a disability is established under subsection (4) of section 301, then weekly wage benefits are determined only by what follows in subsection (5) of section 301. Instead, the sentence says that if a disability is established under subsection (4) of section 301, then entitlement to weekly wage loss benefits is determined by section 301 (i.e., not just what follows in subsection (5) of section 301) and by what follows in subsection (5) of section 301. Consequently, when the answer to each of the "ifs" that follow turns out to be "no," then entitlement to weekly wage loss benefits is determined by looking to the balance of section 301. Doing so, in turn, sends one to other sections of the WDCA inasmuch as subsection 301(1) states: "An employee, who receives a personal injury arising out of and in the course of employment by an employer who is subject to this act at the time of the injury, shall be paid compensation as provided in this act." Hence, this then implicates the provisions of §§ 361 and 371, among other things.

B. The WCAC Did Not Conduct An Impermissible De Novo Review, Nor Did It Substitute Its Findings of Fact For Those Of The Magistrate.

There is no dispute that the WCAC is obligated to defer to the magistrate regarding his findings of fact. That is, "[t]he WCAC treats the magistrate's findings of fact as conclusive 'if supported by competent, material, and substantial evidence on the whole record.'" *Mudel, supra* at 732, quoting MCL 461.861(a)(3). However, when the magistrate applies the law to those findings of fact in order to draw a secondary conclusion (e.g., that Plaintiff-Appellant's income was return on investment rather than the type of earnings that evince a wage-earning capacity), that secondary conclusion, which may be termed a holding or ruling, is, as the WCAC recognized, reviewed de novo as a conclusion of law. Consequently, the WCAC made no error in this regard.

In *Deziel v Difco Laboratories, Inc*, 394 Mich 466, 475; 232 NW2d 146 (1975), this Court

distinguished legal and factual issues in a workers' compensation case as follows:

> What is always at issue in these cases is a "jural relation"--a right to compensation in the claimant, and a liability for it in the defendant....
>
> This means simply that in determining any jural relationship, the facts upon which such relationship is to be predicated are "ordinary facts" and the jural relationship itself (which in a very real sense is also a fact) is deemed a "holding," "ruling," or "conclusion" of law.
>
> It is to the former, the facts upon which the jural relationship is based--"ordinary facts"--that the constitution addresses itself, and not the latter--which are called legal principles.

By way of example, in *Fraley v General Motors Corp*, 199 Mich App 280; 500 NW2d 767 (1993), the plaintiff had suffered a high-frequency hearing loss. Although his physician restricted him from working around loud machinery, a hearing specialist testified that the plaintiff's hearing loss would not interfere with his ability to work or to hear and understand speech. The magistrate found that the plaintiff had failed to prove a disability, but the WCAC reversed that determination. On appeal, the defendant-appellee argued, as Plaintiff-Appellant does here, that the WCAC had failed to give proper deference to what the defendant-appellee viewed to be a finding of fact (i.e., that the plaintiff had not proven a disability). The court of Appeals Court cited *Deziel, supra*, then held:

> [T]he WCAC did not reverse the magistrate's findings of fact, it reversed the magistrate's conclusion of law. In fact, the WCAC explicitly adopted the magistrate's finding of work-related hearing loss. It simply reversed the magistrate's legal conclusion that, pursuant to the established facts and under the applicable law, plaintiff was not disabled. [*Fraley, supra* at 282-283.]

That is exactly what happened in the instant case. The WCAC did not reverse the Magistrate's findings of fact but, instead, explicitly adopted the Magistrate's findings regarding the nature and extent of Plaintiff-Appellant's involvement in running the two group homes. The WCAC simply reversed the Magistrate's legal conclusion that, pursuant to the established facts and under

the applicable law, Plaintiff-Appellant's earnings could not be, under § 371(1), credited against compensation due and owing.

Specifically, in the instant case the Magistrate made certain factual determinations regarding Plaintiff-Appellant's involvement in the day-to-day operations of the two group homes. He noted that "plaintiff hired management teams for each of the group homes" and maintained "control over hiring and firing employees, handling complaints from residents, and ensuring proper treatment of residents, as well as performing more incidental services, such as occasionally driving residents and delivering supplies" (Appendix E, p. 6). The Magistrate then concluded that Plaintiff-Appellant's income from operating the group homes was a return on her investment and, therefore, did not establish a post-injury wage-earning capacity that would entitle Defendant-Appellee to a setoff under § 371(1) (Appendix E, p. 7). The WCAC agreed that "the magistrate's findings concerning plaintiff's role in her business" were findings of fact that were sufficiently supported by the record. It noted, however, that "the magistrate's conclusion concerning the legal impact of these facts" was a legal ruling subject to de novo review. Consequently, the WCAC did not misapprehend its administrative appellate role in reviewing a decision of the Magistrate. *Mudel, supra* at 732; *Deziel, supra* at 475; *Fraley, supra* at 282-283.

For these reasons, the Court of Appeals Opinion correctly agreed that the WCAC had not overstepped its bounds in appellate review, and disagreed with Plaintiff-Appellant's position:

> To the extent plaintiff claims that the WCAC erroneously overturned the magistrate's factual findings after stating that it found them to be supported by competent, material, and substantial evidence, we disagree. The record shows that the WCAC clearly considered the facts as found by the magistrate and made a legal conclusion based on those facts. But contrary to the magistrate's holding, the WCAC determined that these facts indicated that plaintiff was more than a passive investor in her business and that her activities with respect to the group homes elevated her income from a simple return on an investment to compensation for work performed or services provided. The WCAC did not apply a de novo standard of

review to the magistrate's factual findings, but properly reviewed them to determine if they were supported by the requisite evidentiary standard and mad a legal conclusion based on those facts" (Appendix A, pp. 3-4).

C. There is No Need To Remand This Matter For A Determination of Whether Some Part Of Plaintiff-Appellant's Income From Operations Represents A Return On Her Investment.

In a misplaced attempt to convince this Court that there is more to this case than meets the eye, Plaintiff-Appellant argues that, accepting the WCAC's conclusion, that a portion of her income from operating the two adult foster care homes should be treated as creditable against compensation due and owing, this matter should be remanded to separate the value of Plaintiff-Appellant's services as administrator of the homes from her return on investment as group home owner. However, the record unquestionably establishes that no further determinations are necessary.

The WCAC clearly included Plaintiff-Appellant's provision of staff to the group homes as an integral part of her role as owner/operator/administrator of the group homes, stating: "The magistrate found plaintiff hires and fires the employees, establishes staff wages, and basically exercises control over the employees" (Appendix D, p. 18). It was this function, coupled with her other services to the homes, that caused the WCAC to conclude that "it cannot be said that plaintiff's income from the group homes business reflects mere passive ownership. As a result [defendant] is entitled to offset the net profit from plaintiff's business" (Appendix D, p. 19). Consequently, inasmuch as the WCAC expressly addressed the import of Plaintiff-Appellant's provision of staff to the homes, there would be no need for a remand since there is nothing left to determine in that regard.

Accordingly, the only remaining issue is Plaintiff-Appellant's assertion that some component of her net income from the group homes reflects her ownership of the buildings. However, this assertion is belied by the undisputed record, as well as the WCAC's affirmation of the Magistrate's

denial of credit to Defendant-Appellee for Plaintiff-Appellant's income from rental properties (Appendix D, p. 19; Appendix E, p. 7). Specifically, Plaintiff-Appellant testified that Mt. Vernon Group Home, Inc., pays rent to her on the houses that she owns and which the corporation uses, just as she collects rent from other properties not occupied by her group homes (Tr I, p. 48). In fact, Plaintiff-Appellant's 1998 income tax return for Mt. Vernon Group Home Inc. indicates that the corporation paid $21,500 in rent for that year. This amount, along with other costs and expenses (such as salaries and wages) was deducted from the corporation's gross revenues of $218,043 in order to arrive at her net income from operations of $87,474 (Appendix J). Consequently, there is no merit to Plaintiff-Appellant's claim that a remand is necessary in order to apportion her net business income to either her role in providing staff to the group homes or her role in providing the buildings to the group homes.

For these reasons, the Court of Appeals did not erroneously rule when it affirmed the WCAC's conclusion that Defendant-Appellee was entitled to the offset (Appendix A, pp. 4-5). Moreover, Plaintiff-Appellant's criticism of standard of limited review and deference are clearly

without merit. *Mudel, supra.*

CONCLUSION

For all of the foregoing reasons, Defendant-Appellee respectfully requests that this Honorable Court **DENY** Plaintiff-Appellant's application for leave to appeal for lack of merit in the grounds presented.

Respectfully submitted,

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